

and there appears to be no decided case as to whether the receiver is an accomplice or not. In my opinion it makes no difference whether the witness is the receiver or the payer and I therefore do not consider PW1 as an accomplice whose evidence requires corroboration.

The next point to consider is whether PW1 is a witness of truth or not. It is a question of fact and the learned President has found as a fact that PW1 is a truthful witness. In his judgment at paragraph 7 he stated that PW1 contacted the police on the following occasions:—

(i) On 11.5.60 at 5 p.m. he reported the Police (Exhibit P-7).

(ii) On 14.5.60 he handed Exhibit P2, P3 and P4 to Inspector Frank David.

(iii) On 18.5.60 he phoned up Inspector Frank David about his meeting with the accused, their visit to the Post Office, his meeting with Koad Chin Hin, who was introduced to him as Koad Chin Joo and about his conversation with accused. PW1 also handed Exhibit P5 to Inspector Frank David.

(iv) On 29.5.60 PW1 also reported the incident between him and accused when accused said he had not enough money, that he had only \$60 and that he would come again on 31.5.60.

(v) As a result of the pre-arranged "trap", accused was found sitting opposite PW1 in the same room and \$100 was recovered from the shirt pocket of PW1 on 31.5.60.

The report Exhibit P-7 was the first information made to the police by PW1, and in it there was no mention about accused giving him money. It was stated that accused had taken money from some fishing stake owner in Penang. According to the defence P-7 is not an information in connection with this particular charge, and also there was discrepancy between PW1's report P-7 and his evidence in chief. PW1's explanation which was accepted by the learned President was that he was nervous and disturbed when he made the report although according to the evidence of Inspector Frank David, PW1 was not nervous, quite normal and not excited. He wrote the report himself. The learned President has given his reasons for not believing the evidence of the appellant and his two witnesses. I am inclined to agree with his views.

In my opinion the learned President has been very thorough and careful in his judgment and has dealt with every aspect of the case. PW1 had made contact with the police from the first meeting with the appellant until appellant's arrest, and taking the evidence as a whole I am satisfied that the learned President has not erred in coming to the decision which he did. I therefore do not feel disposed to disturb his finding.

The appeal is therefore dismissed and the conviction and sentence of the Court below confirmed.

Appeal dismissed.

Solicitor: *Chang Min Tat.*

A GAN CHYE HUAT v. PUBLIC PROSECUTOR

[A. Cr. J. (Ong J.) October 2, 1961]

[J.B. — Criminal Appeal No. 28 of 1961]

Road Traffic — Private vehicles — Presumption under s.144(a), Road Traffic Ordinance, 1958 — Charge under s.92(1).

B The accused was charged under section 92(1) of the Road Traffic Ordinance, 1958, for having used a private motor-car as a public service vehicle without there being in force a valid licence authorising same. The learned Magistrate held that the presumption under section 144(a) of the said Ordinance applied and that it had not been rebutted by the defence. He fined the appellant \$400 and ordered that the motor-car be confiscated. On appeal,

C Held: the presumption under section 144(a) could not have arisen and there is not the remotest cause for resorting to it. There must at all times be adequate ground work before applying the presumption, otherwise every private vehicle owner will be presumptively guilty of an offence under section 92(1) every time he carries in his car any passenger not related to him.

Observations on obiter in *Gun Kim Luu v. Public Prosecutor* (1).

D Case referred to:—

(1) *Gun Kim Luu v. Public Prosecutor* [1961] M.L.J. 35.

CRIMINAL APPEAL.

L. M. Ong for the appellant.

E *Sheik Abdul Rahman* (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

F Ong J.: The accused was convicted in Johore Bahru Magistrate's Court under section 92(1) of the Road Traffic Ordinance, 1958, for having used a private motor-car as a public service vehicle without there being in force a valid licence authorising such use. He was fined a sum of \$400 and the motor-car in question ordered to be confiscated.

G The facts of this case are very simple. On June 7, 1961, at about 7.15 a.m. a detective police constable attached to the Railway C.I.D. at Singapore, while on duty at the Singapore Railway Station near the 3rd class booking office, observed the appellant walking about in a manner which the witness thought fit to describe as "loitering". He saw him speak to a Chinese couple who accompanied him to his car which was then driven away. This perfectly commonplace occurrence, which takes place daily in railway stations at the hours of arrival and departure of trains to and from this terminus, aroused the suspicions of the detective for reasons which I have not attempted to fathom. As a result he telephoned to the Traffic Police at Johore Bahru requesting them to detain the motor-car, the registration number of which he supplied. About an hour later the car was detained by the police at the Customs checking point, Johore Bahru. It carried two passengers and was driven by the appellant, all of whom were identified by the detective when he duly arrived at Johore Bahru four hours after the car had been detained. The appellant was

placed under formal arrest at 1.30 p.m., statements were taken from him and from the two passengers, and the latter were eventually released at about 3 p.m.

Besides the railway detective, the prosecution called as witnesses four policemen attached to the Johore Bahru Central Police Station who could only testify to the detention of the car and its occupants. The sum total of their evidence added not one iota towards proof of guilt that the appellant was carrying passengers for hire or reward. The sixth and last witness for the prosecution was the Enforcement Officer of the Road Transport Department, Johore Bahru, whose entire evidence, except as to ownership of the car, was inadmissible as hearsay.

The learned Magistrate, after hearing the appellant and four other witnesses for the defence convicted on the grounds that the detective, though severely cross-examined, had not been shaken, that two of the police witnesses had corroborated the evidence of a third policeman, and that the presumption under section 144 of the Road Traffic Ordinance, 1958 applied and had not been rebutted by the defence. The presumption under section 144(a) is that "it shall be presumed until the contrary is proved that any conveyance of persons . . . in a motor vehicle was for hire or reward."

With all respect to the learned Magistrate, I am unable to understand how the prosecution could ever be said to have established a *prima facie* case, when the presumption was raised merely on the strength of an unwarranted suspicion by the railway detective. The suspicion was wholly unwarranted in the face of clear

A evidence that the same car had never previously been seen at the railway station, and that the appellant had not been observed approaching or talking to other prospective paying passengers or otherwise conducting himself so as to suggest that he was touting for fares. The detective's evidence, at its highest, was a groundless suspicion, whether or not he was shaken in cross-examination.

B In these circumstances, the presumption under section 144(a) could not have arisen, since there was not the remotest excuse for resorting to it. There must at all times be adequate groundwork before applying the presumption, otherwise every private vehicle-owner will be presumptively guilty of an offence under section 92(1) every time he carries in his car any passenger not related to him, which would result in an intolerable situation.

C I would add that in this case the evidence for the defence was overwhelming and convincing. No grounds have been given by the learned Magistrate for disbelieving such evidence. Grounds of decision are no grounds at all if they fail to set out reasons for the conclusions.

D E I accordingly allow the appeal, quash the conviction, set aside the order for confiscation, and order that the fine be refunded to the appellant.

F In this connection, I would take the opportunity of correcting an error in certain *obiter* observations made by me in *Gun Kim Luu v. Public Prosecutor* ⁽¹⁾. Under section 92(4) of the Road Traffic Ordinance, 1958, the order that must be made is "for the forfeiture or for the release of any motor vehicle seized."

Appeal allowed.

GOH SWEE JOO & ORS. v. PUBLIC
PROSECUTOR

[A. Cr. J. (Hashim J.) October 13, 1961]

[K.L. — Criminal Application No. 4 of 1961]

Criminal Procedure — Preliminary inquiry — Application to be held before another Magistrate — Criminal Procedure Code (Cap. 6), s.417(a), effect of finding of fact by Magistrate.

The duty of a Magistrate holding a preliminary inquiry is to find whether there is a case for committal to the High Court and it cannot be said in such a case that the liberty of the accused is in jeopardy as the Magistrate cannot convict the accused.

MOTION.

M. Shanker for the 1st applicant.

Dato S. M. Yong for the 2nd, 3rd and 4th applicants.

T. H. A. Potts for the Public Prosecutor or a fiat.

Cur. Adv. Vult.

Hashim J.: This is a motion for an order that the preliminary inquiry presently held by Enche Chan Siew Yoon, Magistrate, Kuala Lumpur, into alleged offences by the applicants under section 91 of the Income Tax Ordinance, 1947, and sections 107 and 109 of the Penal Code be transferred to another Magistrate for hearing on the ground that Che Chan Siew Yoon has reached certain findings of fact adverse to the applicants in his written judgment dated the 26th day of July, 1961.

Section 417 of the Criminal Procedure Code gives power to a Judge to transfer criminal cases. From the arguments of counsel for the applicants I presume section 417(a), Criminal Procedure Code, applies. Section 417(a) reads—

“(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate to him.”

Counsel for applicants argued that, as Che Chan Siew Yoon had stated in his written judgment that all the applicants were partners of the same firm and the balance sheet and the profit and loss accounts which formed the subject matter of the charge bore the signatures of the first applicant, he had made a finding of fact prejudicial to the applicants resulting in a feeling of apprehension on the part of the applicants that they would not get a fair and impartial inquiry. Counsel quoted a number of cases in support of their argument. I am of the opinion that the cases so cited are not relevant to the issue in this motion.

The learned Magistrate was asked to give a ruling on a preliminary objection in that the sanction produced in Court was bad in law. The learned Magistrate in a nine-page written judgment (incidentally the judgment could have been much shorter) ruled the sanction was good in law. In the course of his judgment he made the remark about the applicants being directors of the firm. In my opinion the judgment should be read as a whole and if it is so read it is clear

A that the Magistrate has made no finding as to fact.

The duty of a Magistrate holding a preliminary inquiry is to find whether there is a case for committal to the High Court. It cannot be said that the liberty of the accused person is in jeopardy as the Magistrate cannot convict the accused person. Even if the accused person is committed to stand his trial in the High Court, the Public Prosecutor may not proceed with the charge at all—see section 381 of the Criminal Procedure Code. I therefore can see no reason whatsoever in this motion to direct that the preliminary inquiry be held before another Magistrate and the motion is dismissed.

Motion dismissed.

Solicitors: *Lovelace & Hastings; S. M. Yong & Co.*

D PAHANG LIN SIONG MOTOR CO. LTD. &
ANOR. v. CHEONG SWEE KHAI & ANOR.[C.A. (Thomson C.J., Hill and Good JJ.A.)
October 16, 1961]

[K.L. — F.M. Civil Appeal No. 13 of 1961]

E *Damages — Personal injuries — Loss of arm — Pain and suffering — Assessment of damages — Exercise of judicial discretion — Guidance from awards in previous cases — Taking account of local conditions — Paucity and diversity of local cases.*

F The plaintiff, while travelling in a bus owned by the 1st defendant and driven by the 2nd defendant, sustained serious crushing injury to his right arm, which had to be amputated. He was awarded \$2,400 by the learned trial Judge as special damages, and \$25,000 as general damages. On cross-appeal it was argued on behalf of the plaintiff that the award of \$25,000 for general damages was so inordinately low as to justify the Court of Appeal in interfering and in particular that it was very much below the general run of damages given by the Courts in such cases.

G Held: (1) whether or not the award made by the trial Judge was satisfactory, in all the circumstances of the case, it was not a wholly erroneous estimate of the damage suffered. *Dicta* of Birkett L.J. in *Bird v. Cocking & Sons Ltd.* (1), Singleton L.J. in *Rushton v. National Coal Board* (2), and Morris L.J. in *Scott v. Musical* (14) applied;

H (2) in applying the above *dicta* two considerations must be borne in mind: (i) local social economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results; (ii) local reported cases are so few in number and so diverse in their conclusions that they cannot afford any very reliable guidance.

I Cases referred to:—

- (1) *Bird v. Cocking & Sons Ltd.* [1951] 2 T.L.R. 1260.
- (2) *Rushton v. National Coal Board* [1953] 1 Q.B. 495, 499.
- (3) *Waldon v. The War Office* [1956] 1 All E.R. 108.
- (4) *Katijah binti Abdullah v. Leo Leong Toh & Anor.* [1940] M.L.J. 87.
- (5) *Vellama v. Eng & Co. & Anor.* [1940] M.L.J. 246.